No. 82-647

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

DONALD J. KIRKPATRICK,
Petitioner

V.

CHRISTIAN HOMES OF ABILENE, INC.,
and the 326TH DISTRICT COURT OF
TAYLOR COUNTY, TEXAS,
Respondents

ON WRIT OF CERTIORARI TO THE
TEXAS SUPREME COURT

BRIEF FOR RESPONDENT, STATE OF TEXAS

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Counsel of Record

Attorneys for Respondents
The State of Texas
P.O. Box 12548
Austin, Texas 78711
(512) 475-6139

March, 1983

QUESTION PRESENTED FOR REVIEW

Does the Texas statutory scheme involving the relationship of out-of-wedlock children to their biological fathers, taken as a whole, violate the biological father's constitutional right to due process and equal protection of the laws?

THE PARTIES

The State of Texas is a party to these proceedings pursuant to 28 U.S.C. § 2403(b).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW. .	i
THE PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	
I. THE TEXAS STATUTORY SCHEME ADEQUATELY PROTECTS THE RIGHTS OF UNWED FATHERS. .	2
A. The Texas Statutory Scheme	2
B. The Texas Statutory Scheme Adequately Protects The Rights of Unwed Fathers To Due Process. .	5
C. The Texas Statutory Scheme Adequately Protects The Rights of Unwed Fathers To Equal Protection of the Laws. .	6

II. THE TEXAS PATERNITY STATUTES HAVE EFFECTIVELY NEGATED THE TEXAS VOLUNTARY LEGITIMATION STATUTE AS APPLIED TO PETITIONER... 8

CONCLUSION. 10

CERTIFICATE OF SERVICE 11

STATUTORY APPENDIX A-1

TABLE OF AUTHORITIES

Cases

Caban v. Mohammed,
441 U.S. 380 (1979) 7

Compasano v. State,
576 S.W.2d 100 (Tex.Civ.
App. 1978) 6

Flowers v. Texas Department of
Human Resources,
629 S.W.2d 891 (Tex.App.1982) 6

Quillion v. Walcott,
434 U.S. 246 (1978) 7

Stanley v. Illinois,
405 U.S. 645 (1972) 7

Texas Constitution

Texas Equal Rights Amendment,
Art. 1, § 3a 4

Statutes

Texas Code Construction Act,
Texas Civil Statute Art. 5429b-2 . .8

Texas Family Code
Sec. 11.03 (Who May Bring Suit) . 3

Sec. 11.09 (Citation and Notice). 4

Sec. 13.01 (Paternity Suit).. 2

Sec. 13.02 3

Sec. 13.09 4

Sec. 13.21 (Voluntary Legitimation) 1

Sec. 15.02 (Involuntary Termination of Parental Rights).. 5

Law Review Articles

Sampson, Commentary, Texas Tech Family Law Symposium, Vol. 13:897 4

STATEMENT OF THE CASE

The State of Texas is satisfied with the factual recitations in petitioner's Statement. However petitioner's description of the Texas legitimation statute has failed to present an accurate picture of the genuine even-handedness and fundamental fairness afforded unwed fathers in superseding legislation involving the determination of paternity. The comprehensive statutory scheme is described below.

SUMMARY OF ARGUMENT

Petitioner has challenged the facial constitutionality of the Texas voluntary legitimation statute (Texas Fam. Code § 13.21), on grounds that it violates the due process and equal protection rights of unwed fathers. This statute was enacted in 1973. In 1975

the Texas legislature enacted Texas Fam. Code § 13.01 et seq. which guarantees to unwed fathers all of the rights asserted by petitioner in his brief to this Court. Because the State of Texas has already provided due process and equal protection for its unwed fathers, this Court should dismiss the writ of certiorari as improvidently granted and allow petitioner to replead his case in the Texas courts.

ARGUMENT

I. THE TEXAS STATUTORY SCHEME ADEQUATELY PROTECTS THE RIGHTS OF UNWED FATHERS.

A. The Texas Statutory Scheme

In 1975, the Texas legislature enacted Texas Family Code § 13.01 et seq. fully set forth in Respondent's Statutory Appendix. Sec. 13.01 provides that a suit to establish the parent-child relationship between an out-of-wedlock child and the child's biological father

may be brought within four years of the child's birth.[1/] The suit to establish paternity may be brought by the mother, the father, or other interested person. Texas Fam. Code § 11.03. The intention of the legislature to allow the biological father to bring a paternity action is made clear by the plain language of § 13.02(b):

> An order issued under this section is enforceable by contempt, except that if the petitioner is the mother or the alleged father and refuses to submit to the blood test, the Court shall dismiss the suit. If the respondent is the mother or the alleged father and refuses to submit to the blood test, the fact of refusal may be introduced as evidence as provided in Section 13.06(d) of this Code. (emphasis added).

1/ Petitioner's daughter is now only two years old.

See also, Commentary by John J. Sampson, Texas Tech Family Law Symposium, Vol. 13: 897, 904. Texas Fam. Code, § 11.09(a)(9) also provides that notice of any paternity proceeding will be given the alleged father, unless the alleged father is the petitioner. The conscious sex-neutrality of the Texas paterntiy statutes is evident throughout the legislative scheme and is in keeping with the Texas Equal Rights Amendment to the Texas Constitution. Tex.Con.Art. 1, § 3a.

The Texas paternity statutes provide that if the alleged father is found to be the biological father he is automatically designed as a "parent", with all the rights and duties inuring to all legitimate parents. Texas Fam. Code § 13.09. See also Commentary of John Sampson, supra at 915. Once a father is designated as a parent, his parental rights

may not be terminated except pursuant to Texas Fam. Code § 15.02.

B. The Texas Statutory Scheme Adequately Protects The Rights of Unwed Fathers To Due Process.

Texas Fam. Code § 11.09(a)(8) provides that the alleged father or "probable father" must be notified of any suit in which the termination of the parent-child relationship is sought. It was under this provision that the petitioner was notified of the impending adoption of his daughter. Petitioner could have brought a paternity action under Texas Fam. Code § 13.01. Since the actual paternity of petitioner's daughter is not in dispute (J.A. at 106a), petitioner would have been automatically designated as a "parent" under the provisions of the Texas paternity statutes. Under Texas Fam. Code § 15.02, petitioner's parental rights could not

have been terminated unless the State District Court:

(a) found the petitioner to be "unfit" (Tex. Fam. Code § 15.02 (1)(A-K);

(b) with the burden of proof on the party seeking termination (Compasano v. State, 576 S.W.2d 100 (Civ. App. 1978));

(c) by clear and convincing evidence (Flowers v. Texas Dept. of Human Resources, 629 S.W.2d 891 (App. 1982)).

Petitioner does not challenge the adequacy of Texas Fam. Code § 15.02.

C. The Texas Statutory Scheme Adequately Protects The Rights of Unwed Fathers To Equal Protection of the Laws.

Under the Texas paternity statutes, the unwed father is treated differently from the unwed mother in only

two respects, neither of which reach constitutional significance. First, the unwed father must affirmatively initiate some action to be recognized as a parent. This requirement reflects the reality that the identity of the alleged father is often either unknown or uncertain. Petitioner has not claimed that the mere burden of coming forward violates equal protection and this court has never held that all unwed fathers must be treated identically to unwed mothers. Caban v. Mohammed, 441 U.S. 380 (1979); Quillion v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972). The second difference is that the Texas paternity statutes include a statute of limitations. Petitioner here

is well within the statute of limitations.[2/] Furthermore, in recognizing that identical treatment is not constitutionally mandated for all unwed fathers, this Court has specifically excluded from equal treatment those unwed fathers who fail to accept parental responsibility in a timely fashion. Quilloin v. Walcolt, supra.

II. THE TEXAS PATERNITY STATUTES HAVE EFFECTIVELY NEGATED THE TEXAS VOLUNTARY LEGITIMATION STATUTE AS APPLIED TO PETITIONER.

The Texas Code Construction Act, Texas Civil Statute Art. 5429b-2, provides that if statutes are irreconcilable the latest in date of enactment

---

2/ Whether such a statute of limitations may be constitutionally applied to the child is not properly raised in this case.

prevails. Sec. 3.06. The Texas paternity statutes were enacted in 1975 and are the most recent pronouncement of the rights of unwed fathers under Texas law. To the extent that the voluntary legitimation statute required a finding of "best interest" prior to legitimation, it has been negated by subsequent passage of the Texas paternity statutes which require only a finding of biological relationship. See, Commentary by John J. Sampson, supra at 905.

Petitioner did, and still does, have a fundamentally fair and even-handed remedy under state law. The fact that he chose a more onerous legal course--one superseded by subsequent legislation--should not justify this court's intervention.

CONCLUSION

For all the foregoing reasons, Respondent State of Texas respectfully requests this Court dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

JIM MATTOX
ATTORNEY GENERAL OF TEXAS

By _____
David R. Richards
Executive Assistant
Attorney General
Counsel of Record

March 16, 1983

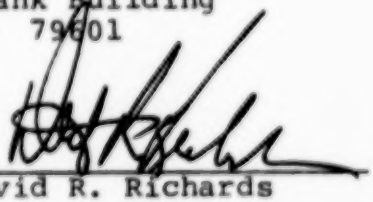
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 1983, a copy of the Brief For Respondent, State of Texas was mailed postage prepaid to the following counsel of record:

Marcia Robinson Lowry
George Kannar
Michael B. Mushlin
Burt Neuborne
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036

Sam Moore
Robinson, Hanna, Moore & Holloway, Inc.
P.O. Box 3819
Abilene, Texas 79604

Charles E. Meyers
Rhodes, Doscher & Heatherly
104 Citizens Bank Building
Abilene, Texas 79601



David R. Richards

STATUTORY APPENDIX

Chapter 13. Determination of Paternity

SUBCHAPTER A. PATERNITY SUIT

Section 13.01. Time Limitation of Suit

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is four years old, or the suit is barred.

Section 13.02. Pretrial Proceedings: Blood Tests

(a) When the respondent appears in a paternity suit, the court shall order the mother, alleged father, and child to submit to the taking of blood for the purpose of one or more blood tests. If the appearance is before the birth of the child, the court shall order the taking of blood to be made as soon as medically practical after the birth.

(b) An order issued under this section is enforceable by contempt, except that if the petitioner is the mother or the alleged father and refuses to submit to the blood test, the court shall dismiss the suit. If the respondent is the mother or the alleged father and refuses to submit to the blood test, the fact of refusal may be introduced as evidence as provided in Section 13.06(d) of this code.

Section 13.03. Pretrial Proceedings: Appointment of Experts

(a) The court may appoint one or more experts qualified as examiners of blood types to make the blood tests. The court may determine the number and qualifications of the experts and shall prescribe the arrangements for conducting the tests.

(b) The court may fix a reasonable fee for each court-appointed examiner and may require the fee to be paid by any or all of the parties or by the Texas Department of Human Resources, if the department is a party of the suit, in the amounts and in the manner directed, or the court may tax all or part or none of the fee as costs in the suit.

(c) A party may employ other qualified examiners of blood tests. The court may order blood samples made available to these examiners if requested.

Section 13.04. Pretrial Proceedings: Conference

(a) After completion of the blood tests, the court shall order all parties to appear, either in person or by counsel, at a pretrial conference. The court shall call its appointed examiners to testify in person or by deposition about their tests and findings. A party may call other qualified examiners of blood tests to testify.

(b) Witnesses called by the court are the court's witnesses, and witnesses called by a party are that party's witnesses. The court and the parties may examine and cross-examine all witnesses.

(c) All evidence presented at the pretrial conference is a part of the record of the case.

Section 13.05. Pretrial Proceedings: Effect of Blood Tests.

(a) At the conclusion of the pretrial conference, if the court finds that the tests show by clear and convincing evidence that the alleged father is not the father of the child, the court shall dismiss the suit with prejudice.

(b) If the court finds that the blood tests fail to show by clear and convincing evidence the alleged father is not the father of the child, the court shall set the suit for trial.

Section 13.06. Evidence at Trial.

(a) Unless otherwise permitted by the court on a showing of good cause, a party may call to testify on the results of the blood tests only those experts who testified at the pretrial conference.

(b) A witness called by a party at the trial is that party's witness.

(c) If the blood tests show the possibility of the alleged father's paternity, the court may admit this evidence if offered at the trial.

(d) Evidence of a refusal by the respondent to submit to a blood test is admissible to show only that the alleged father is not precluded from being the father of the child.

Section 13.07. Settlement

The child must be a party to a settlement agreement with the alleged father. The child shall be represented in the settlement agreement by a guardian ad litem appointed by the court. The court must approve any settlement agreement, dismissal, or nonsuit.

Section 13.08. Decree

(a) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child.

(b) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is not the father of the child, the court shall issue an order declaring this finding.

Section 13.09. Effect of Decree Establishing Paternity.

The effect of a decree designating the alleged father as the father of the child is to create the parent-child relationship between the father and the child as if the child were born to the father and mother during marriage.